



**IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1975**

No. ~~77~~ 5-1866

ROBERT MAURICE STONAKER, Petitioner

v.

THE STATE OF GEORGIA, Respondent

**PETITION FOR WRIT OF CERTIORARI TO
THE COURT OF APPEALS OF GEORGIA**

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA

The Petitioner, Robert Maurice Stonaker, respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeals of Georgia entered in this proceeding on February 13, 1975.

OPINION BELOW

This case reached the Supreme Court of Georgia upon application by the State and subsequently upon application by Petitioner for writ of certiorari to review the decisions and judgments of the Court of Appeals of Georgia as recited in a certificate of the Clerk of the Supreme Court of Georgia as appears in Appendix A. The opinion of the Court of Appeals of Georgia in *Stonaker v. State* decided February 13, 1975, is reported at 134 Ga. App. 123, 213 SE2d 506, and appears as Appendix B. The opinion of the Supreme Court of Georgia in Case No. 29964, *State v. Stonaker*, (Hill J. concurring specially), decided January 8, 1976, is reported at 236 Ga. 1, 222 SE2d 354 and appears as Appendix C. The opinion of the Court of Appeals of Georgia in *Stonaker v. State*, (Pannell, P.J., concurring in the judgment only, Webb, J., concurring in the judgment but not in all expressions in the opinion) decided February 17, 1976, is reported at 137 Ga. App. 834, — SE2d —, and appears as Appendix D. No opinion was issued by the Supreme Court of Georgia in Case No. 31160, *Stonaker v. State*, upon denial of Petitioner's application for certiorari on April 15, 1976 (Undercoffler, P.J., and Ingram, J. dissenting). No opinion was issued by the Superior Court of Clayton County, Georgia.

JURISDICTION

This Court's jurisdiction is invoked under Title 28 USC § 1257 (3). The pertinent date of decision under Petitioner's view is April 15, 1976, the date of denial of Petitioner's application for writ of certiorari by the Supreme Court of Georgia in Case No. 31160. The pertinent date of decision under the view expressed by the State in its motion filed in the Supreme Court of Georgia on April 15, 1976, is January 27, 1976, the date of denial of Petitioner's motion for rehearing by the Supreme Court of Georgia in Case No. 29964.

On April 26, 1976, upon consideration of Petitioner's application, Mr. Justice Powell signed an order extending the time for filing a petition for certiorari in this cause to and including June 25, 1976. This petition was filed within the authorized extension of time, and within 90 days of April 15, 1976.

QUESTION PRESENTED

Where the Supreme Court of Georgia granted the State's application for certiorari to the Court of Appeals of Georgia for the purpose of announcing new rules to assist trial judges in charging on lesser included crimes, and applied the new rules to Petitioner both with respect to the failure to charge on a lesser included crime and the failure to charge on conflicting statements, does the retroactive application of the new rules to Petitioner, who was reasonably justified in the conduct of his defense in relying on existing Georgia authorities as demonstrated by the opinion of the Court of Appeals, infract the Petitioners' right to Due Process and a fair trial.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner's constitutional claims are grounded primarily of the Sixth Amendment right to a fair trial, and the Fourteenth Amendment guarantee of Due Process.

The statutory provisions involved are Ga. Code Ann. § 26-2019; Simple Battery, and Ga. Code Ann. § 26-2019; Child Molestation.

Ga. Code Ann. § 26-1304; Simple Battery:

"A person commits simple battery when he either (a) intentionally makes physical contact of an insulting or provoking nature with the person of another or (b) intentionally causes physical harm to another. A person convicted of simple battery shall be punished as for a misdemeanor."

Ga. Code Ann. § 26-2019; Child Molestation:

"A person commits child molestation when he does any immoral or indecent act to or in the presence of or with any child under the age of 14 years with the intent to arouse or satisfy the sexual desires of either the child or the person. A person convicted of child molestation shall be punished by imprisonment for not less than one nor more than 20 years."

STATEMENT OF CASE

Petitioner was convicted of child molestation in the Superior Court of Clayton County, Georgia, after a jury trial on December 11, 1973, and was sentenced to confinement for a term of 20 years, 10 years of which was probated. He appealed to the Court of Appeals of Georgia which reversed the judgment of conviction on February 13, 1975.

"The Court of Appeals reversed [the] conviction for what it considered deficiencies in the charge of the trial court to the jury: The failure of the trial judge to charge a lesser offense to that offense delineated in the indictment, and the trial judge's failure to charge the jury on the subject of conflicting statement's even though no such charge was requested in writing." *State v. Stonaker*, supra, Ga. at 1

The Court of Appeals held that:

"It was proven in this case that the alleged victim had testified at a preliminary hearing to the effect that defendant's mouth was in contact with her tummy, and nothing more. This would have authorized a charge on assault and battery.

"But on the trial of the case she testified that defendant's mouth was in contact with her private parts which, if believed, would amount to child molestation."

"She testified that her mother had discussed her testimony since the preliminary trial and had told her about her private parts. The evidence was therefore sufficient to show conflicting statements in an important particular; if the first statement was believed, defendant could only be convicted of assault and battery; . . ."

Stonaker v. State, supra, 134 Ga. App. at 128-129.

The Supreme Court of Georgia reversed by judgment dated January 8, 1976 as appears in Appendix E; the Court stated:

"It has not heretofore been held by either of our appellate courts that the crime of battery is a lesser crime included in child molestation. Nor has it been heretofore been held that a charge on battery must be given when the crime specified in the indictment is that of child molestation.

"However, our purpose in granting the application for the writ in this case was to attempt to clarify for the trial courts what must be charged and what may be charged and what need not be charged in the area of lesser included crimes in criminal trials." *State v. Stonaker*, supra, Ga. at 2.

After promulgating its new rules requiring written requests to charge lesser included crimes, the Supreme Court of Georgia stated,

"Under the facts of this case we hold that simple battery . . . is not a lesser included crime of child molestation It was therefore not error for the trial judge to fail to charge the jury on the crime of simple battery in this case.

"The other ruling of the Court of Appeals relating to the failure of the trial judge to charge on the subject of

conflicting statements without a written request to do so was also erroneous. In the absence of a written request for such a charge, it is not error for the trial judge to fail to charge the jury on the issue of conflicting statements made by a witness. The charge given by the court in this case was fair and complete, and the failure to charge the jury on the issue of conflicting statements made by a witness without a written request to so charge, cannot be held to be prejudicial error." *Id.* Ga. at 2-3.

Petitioner timely filed his motion for rehearing in the Supreme Court of Georgia as appears in Appendix F raising the issues that the court had made retroactive application to Petitioner of the new rules both with respect to the failure to charge a lesser included crime and the failure to charge on conflicting statements and so infringed his right to due process and a fair trial. The Supreme Court without opinion denied Petitioner's motion for rehearing by order dated January 27, 1976, as appears in Appendix G. The Court of Appeals of Georgia rendered judgment on February 17, 1976, making the judgment of the Supreme Court dated January 8, 1976; its judgment as appears in Appendix H. Subsequent to the judgment of the Court of Appeals, Counsel for Petitioner reflected upon Rule 36(c) of the Supreme Court of Georgia as appears in Appendix I; Rule 36(c) provided in pertinent part:

"In considering the question of the grant of the petition of certiorari and if granted, *in disposing of the case*, this Court will only consider the questions raised in such petition." (Emphasis supplied).

Since the issues presented to the Supreme Court of Georgia in Petitioner's motion for rehearing had not existed prior to the decision of that court on January 8, 1976, the issues fell outside the questions raised by the State in its petition of certiorari. Thus, the denial of Petitioner's motion for rehearing on January 27, 1976, did not constitute review by the Supreme Court of Georgia of the issues presented in the motion in that they fell outside the ambit of the certiorari jurisdiction of the court as circumscribed by the questions raised in the State's petition.

Following the procedure necessary to obtain review of his issues by the Supreme Court of Georgia, Petitioner timely fil-

ed a motion for rehearing in the Court of Appeals of Georgia which was denied on March 3, 1976.

Petitioner timely filed his application for certiorari in the Supreme Court of Georgia as appears in Appendix J raising the issues that the retroactive application of the new rules both with respect to the failure to charge on lesser included crimes and the failure to charge on conflicting statements infringed his right to Due Process and a fair trial.

The Supreme Court of Georgia without opinion denied Petitioner's motion for rehearing by order dated April 15, 1976, (Undercoffler, P.J. and Ingram J. dissenting) as appears in Appendix K. Petitioner timely filed a motion for reconsideration of denial of application for writ of certiorari which was denied on April 27, 1976.

The Court of Appeals stayed the issuance of the remittitur pending this petition by order dated May 18, 1976, as appears in Appendix L.

REASONS FOR GRANTING THE WRIT

WHERE THE SUPREME COURT OF GEORGIA GRANTED THE STATE'S APPLICATION FOR CERTIORARI TO THE COURT OF APPEALS OF GEORGIA FOR THE PURPOSE OF ANNOUNCING NEW RULES TO ASSIST TRIAL JUDGES IN CHARGING ON LESSER INCLUDED CRIMES, AND APPLIED THE NEW RULES TO PETITIONER BOTH WITH RESPECT TO THE FAILURE TO CHARGE ON A LESSER INCLUDED CRIME AND THE FAILURE TO CHARGE ON CONFLICTING STATEMENTS, THE RETROACTIVE APPLICATION OF THE NEW RULES TO PETITIONER, WHO WAS REASONABLY JUSTIFIED IN THE CONDUCT OF HIS DEFENSE IN RELYING ON EXISTING GEORGIA AUTHORITIES AS DEMONSTRATED BY THE OPINION OF THE COURT OF APPEALS, INFRINGED THE PETITIONER'S RIGHT TO DUE PROCESS AND A FAIR TRIAL.

The Court of Appeals stated, "... [the] defendant himself testified under oath that he kissed the child on the 'tummy' only, without evil thought or intention. This testimony raised the question and issue of whether defendant committed battery and not child molestation." *State v. Stonaker*, supra, 134 Ga. App. at 125

The battery statute, Ga. Code Ann. §26-1304 provides in part that, "a person commits simple battery when he . . . intentionally makes physical contact of an insulting or provoking nature with the person of another" Petitioner's testimony that he kissed the child who was less than seven years old, and therefore incapable of permitting any touching, was a confession of battery. If, as held by the Supreme Court of Georgia, battery is not a lesser included crime of child molestation, Petitioner's corroborated confession of battery was a complete defense to the charge of child molestation; had the jury been instructed as to the elements of battery, the jury could have determined that Petitioner was guilty of battery and not child molestation. The failure of the trial court to charge on battery deprived Petitioner of his sole defense to the charge of child molestation - that he was guilty of battery.

The Court of Appeals held that a charge on assault and battery was authorized by evidence that defendant's mouth was in contact with the child's tummy and nothing more. *State v. Stonaker*, supra 134 Ga. App. at 125

The Court of Appeals said in *McRoy v. State*, 131 Ga. App. 307, 205 SE2d 445 (1974) that

"It has been held many times that where the sole defense in a criminal case is not charged, even without request, such failure constitutes reversible error, See; *Reed v. State*, 15 Ga. App. 435(1), (82 SE2d 674); *Thompson v. State*, 16 Ga. App. 832(4), (84 SE 591); *Henderson v. State*, 95 Ga. App. 830, (99 SE2d 270)."

See also; the authorities cited by Evans, J. in *Stonaker v. State*, supra, 137 Ga. App. at 831-832: *Reynolds v. State*, 1 Ga. 222(1) (1846); *Banks v. State*, 227 Ga. 578, 580, 182 SE2d 106 (1971); *Kerbo v. State*, 230 Ga. 241, 196 SE2d 424 (1973)."

In *Thompson v. State*, supra, (4), the Court of Appeals stated,

"Where there is only one defense on which a party relies, failure to instruct the jury as to the evidence supporting this defense, so specifically that the jury will not only be required to pass upon it, but will be enabled to do so intelligently, under pertinent rules of law and evidence, practically withdraws that defense, and to that extent prejudices the defendant's right to a fair and impartial trial."

The second ground of the opinion of the Supreme Court of Georgia was,

". . . [t]he failure to charge the jury on the issue of conflicting statements made by a witness, without a written request to so charge, cannot be held to be prejudicial or harmful error." *State v. Stonaker*, supra, Ga. at 3.

The Court of Appeals held that

"This evidence was therefore sufficient to show conflicting statements in an important particular; if the first statement was believed, defendant could only be convicted of assault and battery; whereas, if her testimony at the last trial was believed, he could be convicted of child molestation." *Stonaker v. State*, supra, 134 Ga. App. at 128-129.

A charge of conflicting statements was necessary to provide adequate guidance to the jury in its consideration of Petitioner's sole defense - that he was guilty of battery. The Court of Appeals stated,

"In criminal cases the pleadings usually consist of the indictment and the defendant's plea of not guilty. The issues and defense are therefore most often made by the introduction of evidence.

"It has been held error not to charge on to issues in a

case where same are supported by evidence. See, *Jones v. Hogans*, 197 Ga. 404, 412 (29 SE2d 568); *Futch v. Jarrard*, 203 Ga. 47, 51 (45 SE2d 568)." Id. at 128

Further, the Supreme Court of Georgia has held where the *sole defense* is sustained by same evidence, failure to charge the defense is reversible error even in the absence of request. *Pippins v. State*, 224 Ga. 468, 162 SE2d 338 (1968).

The Court of Appeals stated:

"In *Bloodworth v. State*, 216 Ga. 572, 573 (4) (118 SE2d 374), defendant was convicted of rape and it was held reversible error for the trial court to fail to charge on the lesser offenses of assault and battery, assault with intent to rape, and child molestation, when there was evidence sufficient to warrant conviction of such lesser offenses. It is pointed out in *Bloodworth* supra, that *where the only evidence warranting such charge on lesser offenses is the unsworn statement of defendant*, no duty to charge arises unless a written request to charge is filed.

"In the case sub judice there was sworn testimony both as to the victim's testimony at the earlier hearings and by the defendant himself, which both authorized and required a charge on the lesser offense of battery.

"In *Sutton v. State*, 123 Ga. 125, 128 (51 SE 316), the trial court was reversed in a conviction for assault with intent to rape because no charge was given on the lesser offense of assault and battery and the court states: 'The trial judge should be careful to instruct the jury as to the law of every offense involved in the charge made by the indictment, where, *under any view of the evidence*, the accused might be lawfully convicted of such an offense.' (Emphasis supplied). Again, in *Moore v. State*, 151 Ga. 648, 649 (5) (108 SE 47), it is held: 'Where a charge of an offense of graver character includes (without additional averment) a minor offense, it is the duty of the trial judge to instruct the jury upon the law applicable to the

lesser offense, where the evidence, under any view thereof, will authorize a conviction of the lesser offense . . .

“Provision is made by statute for the conviction of an offense *included* in the crime charged in the indictment. Code Ann. § 26-505. A careful reading of Code Ann. § 26-2019 as to child molestation, and of Code Ann. § 26-1304, as to battery, clearly shows the latter may be included in the former, where the offense is established by the same or less than all the facts; or of a less culpable mental state.” *Stonaker v. State*, supra 134 Ga. App. at 125-126. (Emphasis in original.)

Under the state of existing Georgia decisional law as buttressed by careful reading of Ga. Code Ann. §26-2019 as to child molestation, and Ga. Code Ann. §26-1304 as to battery, Petitioner was reasonably justified in the conduct of his defense in relying on existing Georgia authorities in not making a written request to charge on battery as demonstrated by the opinions of the Court of Appeals, *Stonaker v. State*, supra, 134 Ga. App.; *Stonaker v. State*, supra, 137 Ga. App.

The Supreme Court of Georgia explicitly took this case for prospective reasons:

“ . . . our purpose in granting the application for the writ in this case was to attempt to clarify for the trial courts what must be charged and what may be charged and what need not be charged in the area of lesser included crimes in criminal trials.” *State v. Stonaker*, supra, Ga. at 2

Despite the clear wording of battery statute and the opinion of the Court of Appeals, *Stonaker v. State*, supra, 134 Ga. App., the Supreme Court of Georgia cited no decisional law that Petitioner could not be guilty of battery.

Based on existing Georgia law, the crime of battery was, under the circumstances of this case a lesser included crime of child molestation. The holding of the Supreme Court of Georgia constitutes an unforeseeable and retroactive contraction of the crime of battery. Because Petitioner relied on ex-

isting Georgia law that battery was a lesser included crime of child molestation he did not request the trial court to charge on battery; the unforeseeable judicial diminution of the crime of battery resulted in a holding that it was not error for the trial judge to fail to charge the jury as to the crime of battery. While this question has arisen in a procedural context, the effect of the unforeseeable retroactive diminution of the crime of battery is to deny Petitioner his substantive right to his sole defense.

The D.C. Circuit, dealing with the question of whether a District of Columbia impeachment statute should be retroactively applied in trials for offenses committed before the effective date of the statute, said:

“What is, or is not, a procedural change amounting to an *ex post facto* law depends, then, upon its effect on the accused. The effect has been variously stated, [*Kring v. Missouri*, 107 US 221, 2 SCt 443, 27, LEd 506 (1882)] quoted with approval from *United States v. Hall*, 2 C.C. 336, Wash. that a law is ‘*ex post facto*’ which in relation to the offense, or its consequences, *alters the situation of a party to his disadvantage or impairs the defence* which the law had provided the defendant’ at the time of the offense. 107 U.S. at 228-229. (Emphasis added.) *Kring* also held that a law of procedure will be *ex post facto* where it takes away ‘any substantial right which the law gave the defendant at the time to which the law gave the defendant at the time to which his guilt relates,’ *id.* at 232, and this later formulation appears consistently in the later cases as to the other phrases with less consistency. See, [*Hopt v. Utah*, 110 US 574, 4 SCt 202, 28 LEd 262 (1884)]; *Thompson v. Utah*, 170 US 343, 352, 18 SCt 620, 42 LEd 1061 (1898); [*Thompson v. Missouri*, 171 US 380, 384, 388, 18 SCt 922, 43 LEd 204 (1898)] (substantial guarantees); [*Beazell v. Ohio*, 269 US 167, 171, 46 SCt 68, 70 LEd 216 (1925)]; *Frisby v. United States*, 38 App. D.C. 22, 25 (1912)].

“While the question before us may thus be cast in the mold of whether appellants here have been deprived of a substantial right, it is evident that:

‘Just what alterations of procedure will be held to be

of sufficient moment to transgress the constitutional prohibition cannot be embraced within a formula or stated in a general proposition. The distinction is one of degree . . . *Beazell*, supra at 171" *United States v. Henson*, 486 F2d 1292, 1306-1307 (D.C. Cir 1973) (Italics in original)

The principle of fair warning applies in the circumstances here. Petitioner had no fair warning that the crime of battery was not a lesser included crime of child molestation and so relied on existing Georgia authorities that the trial court was required to charge on battery without request.

In *Bouie v. City of Columbia*, 378 US 347, 353-354, 84 SCt 1697, 12 LE2d 844 (1964) the Court stated,

"The standard of state decisional consistency applicable in judging the adequacy of a state ground are also applicable, we think, in determining whether a state court's construction of a criminal statute was so unforeseeable as to deprive the defendant of a fair warning to which the Constitution entitles him. In both situations, 'a federal right turns upon the status of state law as of a given moment in the past - or, more exactly, the appearance to the individual of the status of state law as of the moment ***.' [Amsterdam, note, 109 U. Pa. L. Rev. 67, 74 n. 34]. When a state court overrules a consistent line of procedural decisions with the retroactive effect of denying a litigant a hearing in a pending case, it thereby deprives him of due process of law 'in its primary sense of an opportunity to be heard and to defend [his] substantive right' *Brinkerhoff-Farris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 678, 50 SCt 451, 74 LEd 1107."

The decision of the Supreme Court of Georgia in holding that the trial court did not err in failing to charge on the crime of battery and on conflicting statements lacked fair support in Georgia law. See, *State v. Stonaker*, supra, 137 Ga. App. The holding was unforeseeable and does not constitute an adequate ground to preclude this Court's review of a federal question. See e.g. *Bouie v. City of Columbia*, supra; *Wright v.*

Georgia, 373 US 284, 291, 83 SCt 1240, 10 LE2d 349 (1963); *N.A.A.C.P. v. Alabama*, 357 US 449, 456-458, 78 SCt 1163, 2 LE2d 1488 (1958).

The Supreme Court of Georgia gave retroactive effect to its new rules; thus rewarding the State for its efforts in this case. Here, the unquestioned principle that the defendant is entitled to the benefit of the rule enunciated in his case regardless of the retroactive application of the rule, see, *Stovall v. Denno*, 388 US 293, 300-301, 87 SCt 1967, 18 LEd2d 1199, (1967), has been conversely applied to benefit the State.

The criteria of traditional retrospectivity analysis, *Stovall*, supra, US at 297, viewed from the perspective that the new rules benefit the State, are (a) the purpose of newly announced rule, (b) the extent of reliance by the defendant on existing law, (c) the effect on the administration of justice of a retroactive application of the newly announced rule. Applying these criteria the result is consistent with that reached under the *ex post facto* analysis, supra:

(a) *The Purpose of the Newly Announced Rule*

The stated purpose of the opinion of the Supreme Court of Georgia was "... to clarify for the trial courts what may be charged in the area of lesser included crimes of criminal trials." This purpose serves the underlying policy of aiding the truth-finding function by better ensuring adequately charged juries.

The application of the *Stonaker* rules to cases tried after January 8, 1976, the date of decision, will effectuate the policy underlying the decision. Counsel, aware of their duty under *Stonaker*, will endeavor to make the written requests to charge that *Stonaker* requires.

But application of the *Stonaker* rules to cases tried before the date of decision derogates the policy underlying the decision; counsel, unaware of the duty imposed by a case not yet decided, are unlikely to have conformed to *Stonaker* rule (3) justifiably relying on existing authorities.

The retroactive shifting of the duty to ensure adequately charged juries to counsel incapable of divining future decision results in the imposition of a duty unlikely to have been discharged, while denying to appellants the pre-*Stonaker* remedy of new trials by juries adequately charged by trial

judges informed by appellate decision.

Consonant with the purpose of the grant of application of the writ, "... to clarify for the trial courts what must be charged and what may be charged and what need not be charged ...", *State v. Stonaker*, supra, Ga. at 2, is purely prospective application of the *Stonaker* rules.

(b) *The Extent of Reliance by the Defendant on Existing Law.*

Petitioner was reasonably justified in believing that the trial court was required to charge on battery and on conflicting statements relying on existing Georgia law.

In *England v. Louisiana State Bd. of Med. Exam.*, 375 US 411, 84 SCt 461, 11 LEd2d 440 (1964), the Court said,

"On the record in the instant case, the rule we announce today would call for affirmance of the District Court's judgment. But we are unwilling to apply the rule against these appellants. As we have noted, their primary reason for litigating their federal claims in the state courts was assertedly a view that *Windsor* required them to do so. That view was mistaken, and will not avail other litigants who rely upon it after today's decision. But we cannot say, in the face of the support given the view by respectable authorities, including the court below, the appellants were unreasonable in holding it or acting upon it. We therefore hold that the District Court should not have dismissed their action." Id, US at 422.

Petitioner was clearly reasonably justified in his reliance on existing Georgia authorities in the conduct of his defense.

In *Linkletter v. Walker*, 381 US 618, 14 LEd2d, 601, 85 SCt 1731 (1965), the Court said:

"That no distinction was drawn between civil and criminal litigation is shown by the language used not only in [*United States v. Schooner Peggy*, 1 Cranch 103, 2 LEd 49 (1801)], and [*Chicko County Drainage Dist. v. Baxter State Bank*, 308 US 371, 60 SCt 317, 84 LEd 329 (1940)], but also in such cases as *State v. Jones*, 44 N.M. 623, 107 P2d 324 (1940) and *James v. United States*, 366

US 213, 81 SCt 1052, 6 LEd 2d 246 (1961). In the latter case, this Court laid down a prospective principle in overruling *Commissioner v. Wilcox*, 327 US 404, 66 SCt 546, 90 LEd 752 (1946), 'in a manner that will not prejudice those who might have relied on it.' At 221 of 366 US." Id. US at 627

(c) *Effect on the Administration of Justice*

Retroactive application of the new rules would eliminate trials which would otherwise be granted where failure to charge a lesser included crime is the sole reversible error. Processing of criminal calendars would be aided in a small number of cases. The effect on the administration of justice would be slight, and would be gained in derogation of the policy underlying the new rule - that of aiding the truth-finding function by better ensuring adequately charged juries.

Rationale for Granting the Writ

The unquestioned principle that the defendant is entitled to the benefit of the new rule enunciated in his case whether or not the rule is given retroactive effect in other cases, *Stovall*, supra, US at 301, appears to rest on the incentive theory, *Article III* considerations, and form incident to the Blackstonian view.

The incentive theory requires that the defendant, being a one-time litigant, obtain the benefit of the new rule established in his case. But the converse does not obtain: the state, as an institutional litigant, obtains the benefit of the new rule in future cases and so is amply rewarded for its efforts.

While *England*, supra, did not discuss any implication of *Article III*, see *Stovall*, supra, US at 301, importation here of jurisprudential notions analogous to *Article III* would derogate the doctrine of state distribution of power.

The increasing emphasis being placed on societal interests by the Court portends numerous appellate decisions establishing new rules benefiting the state. The writ should be granted because this case provides a vehicle for the teaching of retrospectivity analysis in the context of a non-federal case in which the new rules benefit the state.

Articulation of retrospectivity analysis here will serve to

safeguard reliance interests protected by the Due Process Clause while identifying purely prospective overruling as a constitutionally permissible tool for the fashioning of new rules.

"Thus, the accepted rule today is that in appropriate cases the Court may in the interest of justice make the rule prospective. And 'there is much to be said in favor of such a rule for cases arising in the future.' *Mosser v. Darrow*, 341 US 267, 276, 71 SCt 680, 95 LEd 927 (dissenting opinion of Black, J.).

Retrospectivity analysis by the Court in this case would likely result in a substantial increase in the use of purely prospective overruling thereby accelerating consistency to decision of the Court while preserving the core concept of stare decisis - stability of law applicable to litigants.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the Court of Appeals of Georgia.

Respectfully Submitted,

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APPENDIX A

SUPREME COURT OF THE STATE OF GEORGIA,

CLERK'S OFFICE, Atlanta, April 20, 1976

I, Joline B. Williams, Clerk of the Supreme Court of Georgia, do hereby certify that, as appears from the records and files in this office, Supreme Court Case numbers 29964 (The State v. Robert Maurice Stonaker - application for certiorari to the Court of Appeals of Georgia granted April 14, 1975, decided January 8, 1976, and motion for rehearing denied January 27, 1976) and 31160 (Robert Maurice Stonaker v. The State - application for certiorari to the Court of Appeals of Georgia denied on April 15, 1976) reached this court by applications for certiorari to the Court of Appeals of Georgia in that court's Case No. 49931, Robert Maurice Stonaker v. The State.

Witness my signature and the seal of the said Court hereto affixed the day and year above written.

Clerk.

APPENDIX B

COURT OF APPEALS OF GEORGIA

49931. STONAKER v. THE STATE.

EVANS, Judge.

Defendant was convicted of child molestation, and sentenced to serve 20 years - 10 years in the penitentiary and 10 years on probation. Motion for new trial was denied, and defendant appeals. *Held:*

1. Defendant contends that because the child in an earlier hearing testified that the defendant kissed her abdomen several inches below the navel and well above the vaginal area, that the evidence was more consistent with battery than child molestation. But, the child did testify that the defen-

dant's mouth was against her privates, and her credibility, including the possibility that she might have confused the times and incidents, was for determination by the jury. The jury is the sole and exclusive judge of the credibility of the witnesses. *Reece v. State*, 155 Ga. 350 (116 SE 631); *Bell v. State*, 164 Ga. 292 (138 SE 238). After verdict, a reviewing court must construe the evidence in favor of the judgment rendered. *Bell v. State*, 21 Ga. App. 788 (95 SE 270); *Wren v. State*, 57 Ga. App. 641, 644, (196 SE 146); *Lee v. State*, 126 Ga. App. 38, 39 (189 SE2d 872). There is sufficient evidence to support the verdict. *Fulford v. State*, 221 Ga. 257 (144 SE2d 370).

2. The court interrogated the child, and then made a definite finding that she understood the difference between right and wrong; and that she would be punished if she did not tell the truth, and that she swore to tell the truth, and that she was competent to testify. While he did not ask specifically whether the child understood the nature of an oath, the examination was sufficient to determine that she did. *Frasier v. State*, 143 Ga. 322 (85 SE 124); *Ruff v. State*, 132 Ga. App. 568 (208 SE2d 581), and cases cited in Division 2 thereof. The case of *Warthen v. State*, 11 Ga. App. 151, 152 (74 SE 894), relied upon by defendant, differs from this case, in that there the child swore she had no knowledge of the nature of an oath, whereas in the case sub judice, it was shown that the witness understood the meaning of taking an oath, and that if she did not tell the truth she would be punished. *Reece v. State*, 155 Ga. 350, supra; *Style v. State*, 175 Ga. 95 (165 SE 7); *Jones v. State*, 219 Ga. 245 (132 SE2d 648); *Lashley v. State*, 132 Ga. App. 427 (5) (208 SE2d 200). The enumeration is without merit.

3. Defendant enumerates error on the trial court's failure to charge the jury on the lesser offense of battery. In this connection he contends the child herself testified that she had sworn, in an earlier hearing, that defendant kissed her on her tummy (and not on her private parts); that she admitted her mother had talked with her since the first hearing and told her about the term "private parts." He contends if the jury believed her earlier version of the transaction, the greatest crime of which he could have been convicted was battery under Code Ann. § 26-1304, which is a misdemeanor; whereas

he was actually convicted of child molestation, under Code Ann. § 26-2019, which carries a penalty of 20 years, and that he received the extreme penalty of 20 years, 10 years to be served in prison and 10 years on probation. In *Bloodworth v. State*, 216 Ga. 572, 573 (4) (118 SE2d 374), defendant was convicted of rape and it was held reversible error for the trial court to fail to charge on the lesser offenses of assault and battery, assault with intent to rape, and child molestation, when there was evidence sufficient to warrant conviction of such lesser offenses. It is pointed out in *Bloodworth* supra, that where the only evidence warranting such charge on lesser offenses is the unsworn statement of defendant, no duty to charge arises unless a written request to charge is filed.

In the case subjudice there was sworn testimony, both as to the victim's testimony at the earlier hearings, and by the defendant himself, which both authorized and required a charge on the lesser offense of battery. Even if we disregard the contradictory testimony of the child at the first and second hearings, defendant himself testified under oath that he kissed the child on the "tummy" only, without evil thought or intention. This testimony sufficiently raised the question and issue of whether defendant committed battery, and not child molestation. It is the duty of the trial judge to charge on a defense which is supported by sworn testimony in the case.

Phenix Ins. Co. v. Hart, 112 Ga. 765 (1) (38 SE 67); *Chatanooga & Durham R. Co. v. Voils*, 113 Ga. 361, 362 (38 SE 819); *Investors Syndicate v. Thompson*, 172 Ga. 201 (2b) (158 SE 20).

In *Sutton v. State*, 123 Ga. 125, 128 (51 SE 316), the trial court was reversed in a conviction for assault with intent to rape because no charge was given on the lesser offense of assault and battery, and the court states: "The trial judge should be careful to instruct the jury as to the law of every offense involved in the charge made by the indictment, where, under any view of the evidence, the accused might be lawfully convicted of such an offense." (Emphasis supplied.) Again, in *Moore v. State*, 151 Ga. 648, 649 (5) (108 SE 47), it is held: "Where a charge of an offense of graver character includes (without additional averment) a minor offense, it is the duty of the trial judge to instruct the jury upon the law applicable

to the lesser offense, where the evidence, under any view thereof, will authorize a conviction of the lesser offense . . ."

Provision is made by statute for the conviction of an offense *included* in the crime charged in the indictment. Code Ann. § 26-505. A careful reading of Code Ann. § 26-2019 as to child molestation, and of Code Ann. § 26-1304 as to battery, clearly shows the latter may be included in the former, where the offense is established by the same or less than all the facts; or of a less culpable mental state.

In view of the evidence and the authorities cited, it was error for the trial judge to fail to charge the jury on the lesser offense of battery.

Defendant contends the court erred in failing to charge, even without a request, that where the evidence and all reasonable deductions present two theories, one of guilt and the other consistent with innocence, *the theory consistent with innocence must be accepted*.

Defendant cites *Patrick v. State*, 75 Ga. App. 687 (44 SE2d 297), and *Davis v. State*, 13 Ga. App. 142 (78 SE 866). These cases do not deal with *failure to charge*, but with the *sufficiency of evidence to convict when based upon circumstantial evidence*. No case is cited, and we know of none, which holds that failure to charge on this theory is reversible error; and this is especially true where the verdict of guilty is supported, as in the case sub judice, *by direct evidence*. The little girl testified positively that defendant placed his mouth on her private parts; her credibility was for the jury; and simply because she had earlier given a different version, and because the defendant testified that he did not commit the act as she described it, can in no sense be said to present two opposing theories requiring the jury to accept defendant's version, which is consistent with his innocence of the crime of child molestation. To so hold would in effect mean that in every case where defendant and his witnesses support his contention of innocence, the jury must be charged that the jury must accept defendant's version, and disregard the state's witnesses and their version of his guilt. That simply is not the law. For a comprehensive discussion of this question see *Nolen v. State*, 124 Ga. App. 593, 594, 595, (184 SE2d 674), and cases there cited, and especially discussion on motion for rehearing at

pages 596, 597, albeit there defendant's statement was not under oath.

5. Defendant contends that in the pre-sentencing phase of the case, a certified copy of a jury conviction and order of probation in a molestation of a child case from the State of California should not have been allowed in evidence against him because it did not contain a final judgment. This contention is not meritorious for the document showed a conviction by a jury and an order of probation for five years upon the conditions therein set out. This was a final judgment following the jury verdict under Code Ann. § 27-2534.

6. Defendant enumerates error as to the admission in evidence of several misdemeanor cases during the pre-sentencing phase in which nolo contendere or guilty pleas were entered wherein the defendant had waived counsel. Defendant contends these convictions were void because he was denied benefit of counsel and therefore they were illegal under *Clenney v. State*, 229 Ga. 561, 563 (4) (192 SE2d 907). In *Clenney*, supra, the Supreme Court followed *Gideon v. Wainwright*, 372 U. S. 335 (83 SC 792, 9 LE2d 799, 93 ALR 733), and *Burgett v. Texas*, 389 U. S. 109, 115 (88 SC 258, 19 LE2d 319), and held that it was error to allow in evidence the record of *felony* convictions which did not show the defendant was represented by counsel. Here the evidence was pleas of guilty and nolo contendere in *misdemeanor* cases, and no case has been cited wherein the ruling in *Wainwright*, has been extended further than to felony cases. In *Collins v. State*, 129 Ga. App. 87 (3), 88 (198 SE2d 707), this court held a sentence in a felony case was void because an indictment which showed a plea of guilty without counsel was void because the state did not show it was entered freely, voluntarily and intelligently on the part of the defendant. While the Supreme Court of the United States may extend its ruling in the *Wainwright* case to include misdemeanors, it has not as yet done so, and we will not extend this ruling further until it has been thus extended.

7. At the conclusion of the court's charge to the jury, defendant's counsel suggested to the court that he should charge the jury on "conflicting statements." It is the law of this state that a witness may be *impeached by proof of conflicting*

statements. See Code § 38-1803. The court refused to charge on impeachment by conflicting statements, and defendant enumerates error. He contends the failure to charge the jury thereon took away from him one of his main defenses, to wit, that the state's witness - the alleged victim - had made conflicting statements, and the jury could have decided her testimony was impeached and could have disbelieved her for that reason.

In criminal cases the pleadings usually consist of the indictment and defendant's plea of guilty. The issues and defenses are therefore most often made by the introduction of evidence.

It has been held error not to charge on the issues in a case where same are supported by evidence. See *Jones v. Hogans*, 197 Ga. 404, 412 (29 SE2d 568); *Futch v. Jarrard*, 203 Ga. 47, 51, (45 SE2d 420). And on the same line, it is error not to charge on a defense in a criminal case which is supported by evidence. See *Glaze v. State*, 2 Ga. App. 704 (2), 708, 709, (58 SE 1126); *Reed v. State*, 15 Ga. App. 435 (1) (83 SE 674); *Thompson v. State*, 16 Ga. App. 832 (4) (84 SE 591); *Walker v. State*, 86 Ga. App. 875, 879 (72 SE2d 774); *McRoy v. State*, 131 Ga. App. 307, 308 (4) (205 SE2d 445). It was proven in this case that the alleged victim had testified at a preliminary hearing to the effect that defendant's mouth was in contact with her tummy, and nothing more. This would have authorized a charge on assault and battery.

But on the final trial of the case she testified that defendant's mouth was in contact with her private parts, which, if believed, would amount to child molestation. She testified her mother had discussed her testimony since the preliminary trial and had told her about her private parts. This evidence was therefore sufficient to show conflicting statements in an important particular; if the first statement was believed, defendant could only be convicted of assault and battery; whereas, if her testimony at the last trial was believed, he could be convicted of child molestation. And of course, if the jury did not believe the victim at all because of these conflicting statements, a verdict of not guilty was authorized. The failure to charge on conflicting statements under this state of the record was error.

8. For the reasons stated above, the judgement is reversed. Judgment reversed. Pannell, P.J., and Webb, J., concur.

ARGUED NOVEMBER 6, 1974 - DECIDED FEBRUARY 13, 1975 - REHEARING DENIED MARCH 4, 1975 - CERT. APPLIED FOR.

Child molestation. Clayton Superior Court. Before Judge Banke.

Weiner & Bazemore, Paul S. Weiner, for appellant.

William H. Ison, District Attorney, Clarence L. Leathers, Jr., Assistant District Attorney, for appellee.

APPENDIX C

SUPREME COURT OF GEORGIA

29964. THE STATE v. STONAKER.

Gunter, Justice.

We granted the state's application for a writ of certiorari to review the decision and judgment of the Court of Appeals in *Stonaker v. State*, 134 Ga. App. 123 (213 SE2d 506) (1975). The Court of Appeals reversed respondent's conviction for what it considered deficiencies in the charge of the trial court to the jury: The failure of the trial judge to charge the jury on a lesser offense to that offense delineated in the indictment, and the trial judge's failure to charge the jury on the subject of conflicting statements of the victim even though no such charge was requested in writing.

The indictment charged the respondent with child molestation: "A person commits child molestation when he does any immoral or indecent act to or in the presence of or with any child under the age of 14 years with the intent to arouse or satisfy the sexual desires of either the child or the person." Code Ann. §26-2019. The charge to the jury was complete and accurate with respect to this alleged crime.

The Court of Appeals rules that the evidence would also

authorize a conviction on the lesser included crime of battery, and since the trial judge failed to charge the law with respect to the crime of battery, the charge was erroneous.

It has not heretofore been held by either of our appellate courts that the crime of battery is a lesser crime included in child molestation. Nor has it been heretofore held that a charge on battery must be given when the crime specified in the indictment is that of child molestation.

However, our purpose in granting the application for the writ in this case was to attempt to clarify for the trial courts what must be charged and what may be charged and what need not be charged in the area of lesser included crimes in criminal trials.

We now proceed to set forth the following rules in this area of the criminal law:

(1) The trial judge must charge the jury on each crime specified in the indictment or accusation, unless the evidence does not warrant a conviction of such crime, or unless the state has affirmatively withdrawn a crime or stricken it from the indictment or accusation.

(2) The trial judge also may, of his own volition and in his discretion, charge on a lesser crime of that included in the indictment or accusation. However, his failure to do so, without a written request by the state or the accused, is not error.

(3) The state or the accused may, by written application to the trial judge at or before the close of the evidence, request him to charge on lesser crimes that are included in those set forth in the indictment or accusation, and his failure to so charge as requested, if the evidence warrants such requested charge or charges, shall be error.

(4) An erroneous charge on a lesser crime to that set forth in the indictment or accusation does not rise to the level of reversible error, unless such charge was harmful to the accused as a matter of law.

By the establishment of these rules it is obvious that the decision of this court in *Kerbo v. State*, 230 Ga. 241 (196 SE2d 424) (1973) and similar rulings in other cases by this court and the Court of Appeals are overruled.

Under the facts of this case we hold that simple battery as

defined in Chapter 26-13 of the Criminal Code of Georgia is not a lesser crime included in the crime of child molestation as defined in Chapter 26-20 (Sexual Offenses) of the Criminal Code of Georgia. It was therefore not error for the trial judge to fail to charge the jury on the crime of simple battery in this case.

The other ruling of the Court of Appeals relating to the failure of the trial judge to charge on subject of conflicting statements without a written request to do so was also erroneous. In the absence of a written request for such a charge, it is not error for the trial judge to fail to charge the jury on the issue of conflicting statements made by a witness. The charge given by the court in this case was fair and complete, and the failure to charge the jury on the issue of conflicting statements made by a witness, without a written request to so charge, cannot be held to be prejudicial or harmful error.

Judgment reversed. All the Justices concur, except Hill, J., who concurs specially.

SUBMITTED AUGUST 8, 1975 - DECIDED JANUARY 8, 1976 - REHEARING DENIED JANUARY 27, 1976.

Certiorari to the Court of Appeals of Georgia - 134 Ga. App. 123 (213 SE2d 506).

William H. Ison, District Attorney, Clarence L. Leathers, Jr., Assistant District Attorney, for appellant.

Paul S. Weiner, for appellee.

HILL, Justice, concurring specially.

I concur in the opinion and judgment of the court. I feel compelled, however, to state my reasons for joining the holding that the failure of the trial judge to charge on a lesser crime included in the crime alleged in the indictment or accusation, without written request by the state or the accused, is not error.

In the majority of criminal trials the defendant takes the position that he is not guilty of the crime alleged or any other crime for which he could be convicted. A defendant rarely contends at trial that he is not guilty of the crime alleged, but might be guilty of a lesser included offense. As a matter of tactics, the defendant defends at trial on the basis that the

jury should find him not guilty and set him free.¹

After the jury finds the defendant guilty of the crime alleged in the indictment and sentence is imposed thereon, the strategy of the defense is to obtain a new trial on any reversible error, including failure of the trial judge to charge a lesser included offense which the defendant would not have requested at the original trial.² This change in defense strategy is particularly noticeable in cases where appellate defense counsel is not the same attorney who tried the case. New appellate counsel reviews the transcript of the trial and sees that the defendant might have received a lighter sentence if he had been found guilty of a lesser crime which was not given in charge. Appellate counsel therefore seeks a new trial on the ground that the trial judge did not charge, without request, a lesser included offense, notwithstanding the fact that he was not guilty of any offense for which he could be convicted and should be set free.

Under the prior rule (that the trial judge was required to charge, without request, the law applicable to lesser included offenses, where the evidence would have authorized conviction on a lesser offense), the defendant was permitted to defend his first trial as stated above, and get a new trial because the trial judge failed to charge, without request, the lesser included offense. That is to say, a defendant accused of an offense as to which there was a lesser included offense as shown by the evidence, was virtually assured of a second trial if he could avoid referring to the lesser offense at his first trial and if the trial judge only charged the jury according to the defendant's announced theory of defense.

Today's decision will assist trial judges by placing the duty upon counsel for the defendant and for the state to request that the jury be charged as to applicable lesser included offenses where instruction as to such offenses is desired by either party.

It is for the foregoing reasons that I concur in the opinion and judgment of the court.

¹In this connection, see *Brown v. State*, 235 Ga. 806 (2); *Edwards v. State*, 235 Ga. 603 (3).

²See *Brown v. State*, supra; *Edwards v. State*, supra.

APPENDIX D

COURT OF APPEALS OF GEORGIA

49931. *Stonaker v. State*

EVANS, Judge.

The Court of Appeals reversed the lower court in this case on the 13th day of February, 1975; the Supreme Court held the case until January 8, 1976, and reversed the Court of Appeals and now sends its judgment to us (The Court of Appeals) so we may correct our judgment accordingly. See *Stonaker v. State*, 134 Ga. App. 123 (213 SE2d 506), and *State v. Stonaker*, 235 Ga. (#29964, decided January 8, 1976).

The Supreme Court of Georgia began operation and deciding cases in 1864; the Court of Appeals of Georgia began operation and deciding cases in 1907. During these one hundred and thirty years there has been a certain principle firmly fixed and established, and constantly, consistently and correctly followed, to wit:

"In all criminal cases, it is reversible error for the trial judge to fail to charge, *even without a request*, that the jury may convict of a lesser offense instead of the offense charged, where there is *slight evidence* that the lesser offense is the one that was committed."

All former Justices of the Supreme Court and all former judges of the Court of Appeals have been firmly committed to the above proposition of law.

The renowned and great Jurists who formerly served on the Appellate Courts of Georgia were responsible for giving form and substance to our law through their profound learning and decisions, and for bringing Georgia forward and to the very forefront in the history of jurisprudence. Of these great jurists it can be truthfully stated that their stars were the brightest luminaries in the entire galaxy of the heavens, where the study of law and the writing of decisions that made and upheld the law were concerned.

We may begin with *Reynolds v. State*, Ga. 222 (1), written by Justices Hiram Warner, Joseph Henry Lumpkin, and Eugenius A. Nisbet. And in the Court of Appeals, we may

begin with *Freeman v. State*, 1 Ga. App. 276 (1) (57 SE 924); written by Judges Benjamin Harvey Hill, Richard Brevard Russell and Arthur Gray Powell. To this list of giants we reverently add the names of Logan E. Bleckley, James Jackson, Andrew J. Cobb, and Thomas J. Simmons.

And so these stalwarts, with their genius and their great intellects, strode across the pages of the legal history of Georgia in ten-league boots, leaving their footprints in their legal decisions.

With the legal principle we have set forth at the outset, all of them agreed; not one disagreed.

Even as late as 1971, a unanimous decision by the Supreme Court of Georgia, held to this principle firmly and unequivocally in the case of *Banks v. State*, 227 Ga. 578 (182 SE2d 106), at 580, as follows:

"On the trial of a murder case, if there be any evidence, *however slight*, as to whether the offense is murder or voluntary manslaughter, *instruction as to the law on both offenses, should be given the jury*. See *Gresham v. State*, 216 Ga. 106 (115 SE2d 191)." (Emphasis supplied.)

And in the *Gresham* case, cited above, at page 108, it is held that the trial court commits error in refusing to charge on the lesser offense, *even though no request to charge is submitted by defendant*.

Now let us discuss the present case, *Stonaker v. State*, supra. The defendant was charged with child molestation, which carries a maximum penalty of 20 years. The evidence was sufficient (more than *slight evidence* although *slight evidence* only is required in such cases) to show that the offense committed was that of simple battery, a misdemeanor, the maximum penalty for which is 12 month's confinement. We reversed for failure to charge the jury that they could convict of battery.

Our reversal was a correct finding, and the Supreme Court, in order to reverse us, was up against the time-honored principle that if there is any evidence, no matter how slight, the judge commits error unless he charges the jury they may convict of the lesser offense. So what did they do?

First, they reversed themselves in *Kerbo v. State*, 230 Ga.

241 (196 SE2d 424) (which court included four Justices who are still members of the Court) and specifically named this case as being overruled. We do not know how many others of their own cases these seven Justices overruled, a study of all of them would be a time-consuming chore. But note the language these seven Justices use:

"By the establishment of these rules it is obvious that the decisions of this court in *Kerbo v. State*, 230 Ga. 241, 196 SE2d 424 (1973) *and similar rulings in other cases by this court and the Court of Appeals are overruled*." (Emphasis supplied.)

Please note the underlined words:

"*and similar rulings in other cases by this court and the Court of Appeals are overruled*." (Emphasis supplied).

Apparently inoffensive and not too important, they are nevertheless "as deep as the ocean - as high as the sky." They are almost without beginning and without ending. They are as a mighty wind-storm or sand-storm that covers the face of the earth and devastates as it moves forward; as a mighty conflagration that consumes and destroys without leaving anything of value in its path.

In other words, the present seven Justices are overruling hundreds, nay thousands, of earlier cases. Every murder case, wherein it was held the court erred in not charging on manslaughter, is overruled. What happens to the individuals who have been acquitted under this principle which is now being laid to rest and buried by the present members of the Supreme Court? Could the seven Justices who made this ruling have failed to realize how far-reaching is their decision and what they have done to the law?

Some of those earlier giants who occupied the Supreme Court, who tower over each and all of us now on the Appellate Courts of Georgia, whose decisions stand as a memorial to their greatness and their genius, would turn over in their graves if they could but know their great, their correct, and their legal decisions are now being overruled.

These great legal giants include:

Nesbit
Lumpkin
Bleckley
Jackson (James)
Cobb
Simmons
Russell
Candler (T.S.)
Duckworth
Atkinson (S. C.)
Beck
Hall (Samuel)
Blandford
Evans (Beverly)

All of these distinguished and eminent justices either wrote decisions or voted for decisions holding that it is reversible error, even without a request, to fail to charge that the jury may convict of a lesser offense instead of the greater offense, if there is even slight evidence to show the lesser offense is the one that was committed.

But the former Justices have long since gone back to Mother Earth; their bodies have returned to the dust from which each of us is made, while their glory lives forever! They will be remembered with reverence and honor long after we are gone from this mortal scene.

If those renowned and learned former Justices were alive, no doubt they would suffer hurt because of this ruling in *State v. Stonaker*. But they are sleeping the long sleep, and it is beyond the power of mortal men to affect them even slightly.

Accordingly, and most reluctantly, the judgment and opinion in *Stonaker v. State*, 134 Ga. App. 123, supra, is vacated, set aside, and the judgment and opinion of the Supreme Court in *State v. Stonaker*, 235 Ga., supra, which I believe with all my heart to be erroneous, is substituted therefore, and the judgment of the lower court is

Affirmed. Pannell, P.J., concurs in judgment only; Webb, J., concurs in judgment but not in all expressions in opinion.

APPENDIX E

SUPREME COURT OF GEORGIA

ATLANTA, January 8, 1976

The Honorable Supreme Court met pursuant to adjournment.

The following judgment was rendered:

The State v. Robert Maurice Stonaker

This case came before this court by writ of certiorari from the Court of Appeals; and, after argument had, it is considered and adjudged that the judgment of the Court of Appeals be reversed and that such further action be taken by the Court of Appeals as may be necessary to give effect to the opinion filed in the case. All the Justices concur, except Hill, J., who concurs specially.

Bill of costs, \$30.

Court of Appeals No. 49931

SUPREME COURT OF THE STATE OF GEORGIA,

CLERK'S OFFICE, Atlanta, February 2, 1976

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia, and that Clayton County Board of Comrs., paid the above bill of costs.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Clerk.

APPENDIX F

MOTION OF RESPONDENT FOR REHEARING

COMES NOW, the Respondent in the above-captioned case, within the time allowed by law, and within ten days as calculated by the rules of this Court from January 8, 1976, the date of rendition of the decision of the Court, and makes and files this his Motion of Respondent For Rehearing, and respectfully shows the Court the following:

The decision in the instant case constitutes a sharp break in the line of earlier authority in the sense of *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 US 481, 489, 88SCt 2224, 20 LEd2d 1231 (1968) as to each of the three points of the opinion: A.) establishing rules (2) and (3) opinion, 2, applicable to this Respondent; B.) holding that *Ga. Code Ann. § 26-1304*; battery is not a lesser included crime of *Ga. Code Ann. § 26-2019*; child molestation under the facts of this case; C.) holding that in the absence of a written request to charge, it is not error for the trial judge to fail to charge the jury on the issue of conflicting statements made by a witness. As to each of the three points of the opinion, Respondent in his defense reasonably relied on existing Georgia law.

As to point A., it is clear from the opinion, 2, that the Court by establishing rules (2) and (3) has overruled a substantial body of Georgia case law exemplified by *Kerbo v. State* 230 Ga. 241 (196 SE2d 424) (1973).

As to point B., the holding of *Bloodworth v. State*, 216 Ga. 572, 573 (4) (118 SE2d 374) (1961) provides justification for the reasonable belief that battery is a lesser included crime of child molestation, and that a written request to charge the lesser crime battery was not required; such reasonable belief was further justified by the *Sutton v. State*, 123 Ga. 125, 128 (51 SE 316) (1905) together with further authorities holding that it is the duty of the trial judge to charge on a defense which is supported by sworn testimony as exemplified by the cases cited in the opinion of the Court of Appeals, *Stonaker v. State*, 134 Ga. App. 123, 125 (213 SE2d 506) (1975). The failure to charge on battery was prejudicially harmful for the

further reason that the jury was not given the appropriate legal standard for determining that the Respondent's testimony that he kissed the child on the "tummy" only, without evil thought or intention, was a confession of battery.

As to point C., the failure to charge on conflicting statements denied the Respondent one of his main defenses. Respondent was reasonably justified in believing that the trial judge was required to charge on the issue of conflicting statements under existing decisional law exemplified by the cases cited in the opinion of the Court of Appeals, *Stonaker*, Ga. App. at 128(7).

In the context of retrospectivity analysis, the new rules and interpretations operate to the disadvantage of the Respondent. The unquestioned rule that a defendant obtains the benefit of new law which his case establishes is founded on the "incentive theory"; since a defendant is a "one time litigant" the result is demanded. But the converse does not obtain; the State is an "institutional litigant" which will obtain the benefit of the new rules in future cases and so be amply rewarded for its efforts in this case.

Under all the facts and circumstances of this case it is inequitable, and an infraction of the Due Process clause and of Respondent's rights under the Sixth Amendment to apply the new rules and interpretation to the Respondent.

CONCLUSION

For each of the foregoing reasons, it is respectfully requested that the Court grant a rehearing, and render decision and judgment affirming the judgment of the Court of Appeals which reversed the judgment of the Superior Court of Clayton County.

CERTIFICATE OF COUNSEL

I, Paul S. Weiner, Counsel for Respondent and Movant herein, hereby certify that upon careful examination of the opinion of the Court, I believe that the Court has overlooked the application of the Due Process clause of the Fourteenth Amendment to the United States Constitution in applying

the rules enunciated in the decision to the instant case, in holding that *Ga. Code Ann. § 26-1304; battery* is *not* a lesser included offense of *Ga. Code Ann. § 26-2019; child molestation*, in holding that in the absence of a written request to charge, it is *not* error for the trial judge to fail to charge the jury on the issue of conflicting statements.

APPENDIX G

29964

SUPREME COURT OF GEORGIA

ATLANTA, January 27, 1976

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

The State v. Robert Maurice Stonaker

Upon consideration of the motion for a rehearing filed in this case, it is ordered that it be hereby denied.

SUPREME COURT OF THE STATE OF GEORGIA

CLERK'S OFFICE, ATLANTA, 4/20/76

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Clerk.

APPENDIX H

Court of Appeals
of the State of Georgia

ATLANTA, February 17, 1976

The Honorable Court of Appeals met pursuant to adjournment. The following judgment was rendered:

49931. R. N. Stonaker v. The State

This case came before this court on appeal from the Superior Court of Clayton County; and, after argument had, it is considered and adjudged that the judgment of the court below be affirmed in accordance with the mandate of the Supreme Court of Georgia in *Stave v. Stonaker*, 235 Ga. , (No. 29964, decided January 8, 1976). Pannell, P. J., Evans and Webb, JJ., concur.

BILL OF COSTS, \$30.00

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia, and that

paid the above bill of costs.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

CLERK

APPENDIX I

RULES OF THE SUPREME COURT OF GEORGIA
XVIII. CERTIORARI

Rule 36, Section (c)

Argument.

Oral argument will not be permitted on the petition. Briefs or citation of authority relied on by the petitioner for certiorari may be included in the petition. In considering the question of the grant of the petition for certiorari, and if granted, in disposing of the case, this Court will only consider the questions raised in such petition. This Court may deny the petition; this Court may grant the petition and order oral argument in this Court; this Court may grant the petition and render a decision and judgment without oral argument in this Court; or this Court may, pursuant to Art. VI, Sec. II, Par. IV of the Constitution of Georgia (Code Ann. § 2-3704), vacate the judgment of the Court of Appeals and remand the case to the Court of Appeals for further consideration.

APPENDIX J

APPLICATION FOR WRIT
OF CERTIORARI TO
THE COURT OF
APPEALS OF GEORGIA

NOW COMES, ROBERT MAURICE STONAKER, Applicant in the above-captioned case, and makes and files this his application for a writ of certiorari to review the judgment and opinion entered in this proceeding on February 17, 1976.

JURISDICTION

The Court of Appeals reversed the judgment of conviction and sentence of the Superior Court of Clayton County by judgment and opinion dated February 13, 1975 reported at 134 Ga. App. 123 (213 SE2d 506). This Court in Case No. 29964 reversed the judgment of the Court of Appeals by judgment and opinion dated January 8, 1976. The Court of Appeals by judgment and opinion dated February 17, 1976 vacated its judgment and opinion dated February 13, 1975 and substituted therefore the judgment and opinion of this Court, thereby affirming the judgment of conviction and sentence of the Superior Court of Clayton County. A copy of the opinion of the Court of Appeals is attached as Appendix A.

The issues raised in the motion for rehearing in the Court of Appeals dealt with the retrospective application to Applicant of the new rules announced by this Court in its opinion. While this issue was set out in the Motion of Respondent for Rehearing denied by this Court on February 2, 1976, this issue did fall within the questions raised in the Petition for Certiorari filed by the State; Rule 36(c) provides in pertinent part:

"In considering the question of the grant of the petition of certiorari and if granted, *in disposing of the case*, this Court will only consider the questions raised in such petition." (Emphasis supplied).

Applicant submits that the denial of his Motion of Respondent for rehearing did not constitute a adjudication by this Court as to the issue set out in the motion in that the issues fell outside the ambit of writ.

Applicant's Notice of Intention to Apply for a Writ of Certiorari was filed on March 9, 1976. This application was filed within 30 days of March 3, 1976, the date of the denial of Applicant's Motion for Rehearing by the Court of Appeals.

QUESTION PRESENTED AND ASSIGNMENT OF ERROR

Did the Court of Appeals err in denying Applicant's motion for rehearing brought on the grounds that the application of new rules (2) and (3) announced in the opinion of the Supreme Court constituted a denial of Applicant's right to due process and a fair trial as guaranteed under the Fourteenth and Sixth Amendments to the United States Constitution.

Applicant assigns error on the denial of Applicant's motion for rehearing by the Court of Appeals.

REASONS FOR GRANTING THE WRIT

The opinion of this Court in the instant case constitutes a sharp break in the line of earlier authority in the sense of *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 US 481, 489 88 SCt 2224, 20 LEd2d 1231 (1968) as to each of the three points of the opinion applicable to Applicant: A.) establishing rules (2) and (3) opinion, 2; B.) holding that *Ga. Code Ann. § 26-1304*; battery is not a lesser included crime of *Ga. Code Ann. § 26-2019*; child molestation under the facts of this case; C.) holding that in the absence of a written request to charge, it is not error for the trial judge to fail to charge the jury on the issue of conflicting statements made by a witness. As to each of the three points of the opinion, Applicant in his defense reasonably relied on existing Georgia authorities.

As to point A, it is explicit in the opinion, 2, that the court by establishing rules (2) and (3) has overruled a substantial

body of Georgia case law exemplified by *Kerbo v. State*, 230 Ga. 241 (196 SE2d 424) (1973).

As to point B, the holding of *Bloodworth v. State*, 216 Ga. 572, 573 (4) (118 SE2d 374) (1961) provides justification for the reasonable belief that battery is a lesser included crime of child molestation, and that a written request to charge the lesser crime of battery was not required; such reasonable belief as further justified by the *Sutton v. State*, 123 Ga. 125, 128 (51 SE 316) (1905) together with further authorities holding that it is the duty of the trial judge to charge on a defense which is supported by sworn testimony as exemplified by the cases cited in the opinion of the Court of Appeals, *Stonaker v. State*, 134 Ga. App. 123, 125 (213 SE2d 506) (1975). The failure to charge on battery was prejudicially harmful for the further reason that the jury was not given the appropriate legal standard for determining that the Applicant's testimony that he kissed the child who was less than seven years of age and, therefore, incapable of permitting any touching, on the "tummy" only, without evil thought or intention, was a confession of battery.

As to point C, the failure to charge on conflicting statements denied the Applicant one of his main defenses. Applicant was reasonably justified in believing that the trial judge was required to charge on the issue of conflicting statements under oath under existing decisional law exemplified by the cases cited in the opinion of the Court of Appeals, *Stonaker*, Ga. App. at 128(7). Moreover, Applicant orally requested the Trial Court to so charge.

The usual perspective in retrospectivity analysis is that reliance on the old rule is on the part of law enforcement officers and not by the defendant. *Johnson v. New Jersey*, 384 US 719, 731, 86 SCt 1772, 16 L Ed2d 882 (1966). See generally, *Overruling Decision - Application*, 10 ALR 3d 1371.

The perspective here, however, is that reliance on the old rules was by the defendant and not by agents of the State.

The unquestioned rule that a defendant obtains the benefit of new law which his case establishes is founded on the incentive theory; since a defendant is a one time litigant the result is demanded. But the converse does not obtain; the State is an institutional litigant which will obtain the benefit of the new

rules in future cases and so be duly rewarded for its efforts in this case.

Applicant submits that the equities of the instant case in-veigh against application of the new rules to the Applicant far more heavily than the equities that existed in the civil case of *England v. Louisiana State Bd. of Med. Exam.*, 375 US 411, 84 SCt 461, 11 LEd2d 440 (1964), where the Supreme Court of the United States said,

"On the record in the instant case, the rule we announce today would call for affirmance of the District Court's judgment. But we are unwilling to apply the rule against these appellants. As we have noted, their primary reason for litigating their federal claims in the state courts was assertedly a view that Windsor required them to do so. That view was mistaken, and will not avail other litigants who rely upon it after today's decision. But we cannot say, in the face of the support given the view by respectable authorities, including the court below, the appellants were unreasonably in holding it or acting upon it. We therefore hold that the District Court should not have dismissed their action." Id, US at 442.

Neither the opinion of the court nor the minority opinion, articulating different views of retrospectivity analysis enunciated in the late case of *United States v. Peltier* - US -, 95 SCt 2313, 45 LEd 2d 374, (1975) reflect adversely on Applicant's position, but on the contrary, the policy considerations supporting the majority opinion and the minority opinion respectively fully support, directly or by analogy, Applicant's position herein.

Retrospectivity analysis looks to be purpose underlying the decision. The Court's "... purpose in granting the application for the writ in this case was to attempt to clarify for the trial courts what may be charged in the area of lesser individual crimes in criminal trials."

The announced purpose of the decision serves the underlying policy of aiding the truth finding function by better ensuring adequately charged juries. Rule (3) directly implements this policy by requiring written requests to charge.

The application of the new rules to cases tried after the date of this Court's decision will clearly effectuate the policy underlying the decision, but the application of the new rules to cases tried before the date of the decision will serve no recognized policy and will derogate the policy underlying the decision. Such retroactive application will result in the termination of cases which otherwise would have been remanded for new trials before juries adequately charged by trial judges informed by appellate opinion.

Applicant reasonably relied on Georgia authorities existing on the date of trial; under all the facts and circumstances of this case, it is inequitable, a denial of Applicant's right to due process and a fair trial as guaranteed under the Fourteenth and Sixth Amendment of the United States Constitution to apply the new rules to Applicant.

The issues raised herein are of gravity and importance, and further, present a constitutional question of first impression. Appellant has found no authority furnishing retrospectivity analysis where the new rules benefit the state and not the defendant. The instant case will provide this Court with a vehicle for articulating such retrospectivity analysis. The import of such analysis may be gauged in the light of the increasing emphasis placed on societal interests by the Supreme Court of the United States, which emphasis is likely to result in numerous appellate decisions announcing new rules benefitting the state.

CONCLUSION

For these reasons, it is respectfully urged that a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals of Georgia.

APPENDIX K

SUPREME COURT OF GEORGIA

ATLANTA, April 15, 1976

The Honorable Supreme Court
met pursuant to adjournment.

The following judgment was rendered:

Robert Maurice Stonaker v. The State

Upon consideration of the application for certiorari filed to review the judgment of the Court of Appeals in this case, it is ordered that the writ be hereby denied. All the Justices concur, except Undercofler, P. J., and Ingram, J., who dissent.

Bill of costs, \$30.

SUPREME COURT OF THE STATE OF GEORGIA,

CLERK'S OFFICE, ATLANTA

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia, and that

Paul S. Weiner

paid the above bill of costs.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Clerk.

Case No. 49931

Court of Appeals of Georgia

Remittitur from Supreme Court

Filed in office

Clerk Court of Appeals of Georgia

APPENDIX L

COURT OF APPEALS
OF THE STATE OF GEORGIA

ATLANTA, May 18, 1976

The Honorable Court of Appeals
met pursuant to adjournment.

The following order was passed:

49931. R. N. Stonaker v. The State

It is ordered that the remittitur in this case be stayed pending application to the Supreme Court of the United States for the writ of certiorari.

COURT OF APPEALS
OF THE STATE OF GEORGIA

CLERKS'S OFFICE, Atlanta, May 18, 1976

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Clerk.